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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

14 UNITED STATES OF AMERICA,) 3:01-cr-00177-HDM-VPC
15 Plaintiff,)
16 vs.) ORDER
17 WAYNE SIMPSON,)
18 Defendant.)

Defendant moves for a reduction of sentence pursuant to 18
U.S.C. § 3582(c)(2) (#49). The government has opposed (#53, #55),
and the defendant has replied (#56).

22 Section 3582(c)(2) provides that where a defendant "has been
23 sentenced to a term of imprisonment based on a sentencing range
24 that has subsequently been lowered by the Sentencing Commission . . .
25 . the court may reduce the term of imprisonment . . . if such a
26 reduction is consistent with applicable policy statements issued by
27 the Sentencing Commission." United States Sentencing Guidelines

1 ("U.S.S.G.") § 1B1.10(a)(2) provides:

2 [a] reduction in the defendant's term of imprisonment is
3 not consistent with this policy statement and therefore
4 is not authorized under 18 U.S.C. § 3582(c)(2) if . . .
5 (A) none of the amendments listed in subsection (c) is
applicable to the defendant; or (B) an amendment listed
in subsection (c) does not have the effect of lowering
the defendant's applicable guideline range.

6 Defendant asserts that he is eligible for relief based on
7 Amendment 748, which modified the sentencing ranges for crack
8 cocaine offenses. Amendment 748, however, was merely a temporary,
9 emergency amendment. (U.S.S.G., 2010 Supp. to App. C, Am. 748).
10 On April 6, 2011, Amendment 748 was re-promulgated as permanent and
11 designated as Amendment 750. On June 30, 2011, the United States
12 Sentencing Commission ("Sentencing Commission") voted to make parts
13 A and C of Amendment 750 retroactively applicable, thus allowing
14 eligible defendants to move for reductions of sentence pursuant to
15 § 3582(c)(2). In light of this history and the intent of
16 defendant's motion, the court construes defendant's motion as
17 seeking relief under Amendment 750, rather than Amendment 748.

18 Amendment 750 effectively decreased the sentencing ranges for
19 offenses involving crack cocaine by, in relevant part, amending the
20 drug quantity table in U.S.S.G. § 2D1.1. Amendment 750 is also
21 listed in § 1B1.10(c), making it appropriate for retroactive
22 application. But while the defendant was convicted of an offense
23 involving crack cocaine, he was also determined to be a career
24 offender. As such, defendant's sentence was based on § 4B1.1, the
25 guideline provision for career offenders, not on § 2D1.1. See
26 *United States v. Wesson*, 583 F.3d 728, 731 (9th Cir. 2009) ("[A]
27 drug offense sentence that is 'based on' a sentencing range
28 calculated under U.S.S.G. § 4B1.1 because the defendant was a

1 career offender cannot have been 'based on' a sentencing range
2 calculated under the § 2D1.1 drug amount table. The two sentencing
3 schemes are mutually exclusive."). Amendment 750 had no impact on
4 § 4B1.1. Amendment 750 therefore did not lower defendant's
5 sentencing range and does not apply to his sentence. (See Memo
6 dated May 20, 2011, from Off. of Research & Data & Off. of Gen.
7 Counsel to Chair Saris, Comm'rs, & Judith Shoen, p. 12, available
8 at http://www.ussc.gov/Research/Retroactivity_Analyses/Fair_Sentencing_Act/20110520_Crack_Retroactivity_Analysis.pdf (removing
9 from an analysis of the impact of retroactive application of the
10 crack cocaine amendment offenders originally sentenced pursuant to
11 the career offender and armed career offender provisions, U.S.S.G.
12 § 4B1.1 & § 4B1.4, because "their guidelines range would continue
13 to be controlled by these provisions and would not change")). For
14 that reason, a reduction in defendant's term of imprisonment is not
15 authorized by 18 U.S.C. § 3582(c)(2) and would not be consistent
16 with the Sentencing Commission's policy statement set forth in
17 U.S.S.G. § 1B1.10(a)(2).

19 Defendant argues that he is nonetheless eligible for relief
20 because his sentencing range under § 4B1.1 was based on the
21 statutory maximum for his crack cocaine offense and the Fair
22 Sentencing Act reduced the statutory penalties for crack cocaine
23 offenses. This argument is without merit. No retroactively
24 applicable changes to the career offender guideline have been made
25 in response to the Fair Sentencing Act, and therefore defendant is
26 not eligible for relief under § 3582(c)(2). Putting aside the
27 specific requirements to be eligible for § 3582(c)(2) relief,
28 defendant's argument also fails on a more general level. Even

1 though the statutory maximums for crack cocaine offenses have in
2 many cases been lowered, the Fair Sentencing Act does not
3 retroactively apply to a defendant sentenced before the date it was
4 enacted. *United States v. Baptist*, 646 F.3d 1225, 1227-29 (9th
5 Cir. 2011). Thus, the court cannot apply the current statutory
6 maximums retroactively to calculate a sentence under § 4B1.1 for a
7 defendant who was sentenced before the Fair Sentencing Act was
8 enacted.¹

9 Defendant is not eligible for relief under 18 U.S.C. §
10 3582(c)(2). The defendant's motion for reduction of sentence
11 (#49) is therefore **DENIED**. The defendant's motion for judicial
12 notice (#52) is also **DENIED**.

13 **IT IS SO ORDERED.**

14 DATED: This 8th day of November, 2011.

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17 UNITED STATES DISTRICT JUDGE
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25 'In connection with this argument, the defendant has filed a motion for
26 judicial notice under Federal Rule of Evidence 201 (#52). Although it is
27 not entirely clear, the document sought to be judicially noticed appears to
28 be a legal brief arguing for retroactive application of the Fair Sentencing
Act, Pub. L. No. 111-220, 124 Stat. 2372. As noted above, the Ninth Circuit
has rejected this argument. Accordingly, because the document defendant
seeks judicial notice of provides no support for his motion for reduction
of sentence, the motion for judicial notice (#52) should be denied.